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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 846

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

v.

ESTATE OF HERMAN BORAX, Deceased,
HERMINE H. BORAX, ET AL., Executors,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Second Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

Opinions Below

The opinion of the Tax Court is reported at 40 T. C. 1001. The opinion of the Court of Appeals for the Second Circuit, and the dissenting opinion (App. A of Petition) are reported at 349 F.2d 666.

Jurisdiction

The judgment of the Court of Appeals was entered on July 30, 1965 (App. A of Petition, pp. 41-42). The petition for a writ of certiorari was filed on December 23, 1965. The time for filing a response to the peti-

tion for writ of certiorari was extended to and including February 26, 1966. The jurisdiction of this Court is being invoked under 28 U.S.C. 1254 (1).

Questions Persented

1. Whether payments made by respondent to his first wife Ruth, subsequent to the Mexican divorce, were deductible by respondent.

(a) Where payments were made under a written separation agreement executed on March 16, 1946 and reformed on November 22, 1946; and

(b) Where respondent procured an ex parte Mexican divorce on August 7, 1952 and married Hermine on August 21, 1952 in the same jurisdiction that had granted him the divorce; and

(c) Where on January 28, 1953 the Supreme Court, Special Term, New York County, as a result of an action brought by Ruth, rendered a declaratory judgment holding that her marriage to respondent was valid and his divorce from her invalid.

2. Whether respondent and Hermine Borax were entitled to file joint federal income tax returns for the years subsequent to their marriage and deduct thereon dependency exemptions for Hermine's minor children and her parents.

(a) Where the Supreme Court, Special Term, New York County, New York, on January 28, 1953, as a result of an action brought by Ruth Borax, held in a declaratory judgment that Ruth "is the lawful wife of" respondent and that "the decree of divorce" obtained by respondent "is invalid."

Statutes Involved

The pertinent provisions of the Internal Revenue Code of 1954, section 71(a)(1) and (2), section 215, section 6013 and section 152 are set forth in the Petition Appendix C, pp. 51-54. The applicable sections of the Internal Revenue Code of 1939, being section 22(k), section 23(u), section 51(b) and section 25(b) are set forth in the Petition Appendix C footnotes, pp. 51-54.

Statement

Herman and Ruth Borax were married in New York in 1935, and lived there as husband and wife until March 14, 1946, when they separated by mutual consent. A son, James, was born in 1937. At the time of separation they executed a separation agreement, under the terms of which Ruth received custody of their son and Herman was obliged to pay to Ruth $575.00 per month or $6,900.00 per year, in full satisfaction and discharge of any alimony which might subsequently be awarded by any court. These payments were increased to $8,550.00 per year pursuant to an action instituted by Ruth, by a consent decree which reformed the separation agreement and was entered by the Supreme Court of New York on November 22, 1946. Herman faithfully discharged this obligation during his lifetime.

On August 7, 1952, some six years after the separation, Herman went to the City of Juarez, State of Chihuahua, Mexico whose court entered a final decree of divorce from Ruth, in which was incorporated by

reference, Herman's obligation to pay Ruth $8,550.00 per annum. Ruth did not appear in the action either in person or by an attorney. On August 21, 1952 Herman married Hermine in Juarez, Mexico, the same jurisdiction that had granted him the divorce. On August 29, 1952 Herman went through a second marriage ceremony with Hermine in New Haven, Connecticut. Herman and Hermine thereafter lived together as husband and wife in New York City until the death of Herman in October of 1961.

Soon after the divorce and remarriage, Ruth commenced declaratory proceedings in the Supreme Court of New York, New York County. The Court had personal jurisdiction over Herman and Hermine, they were personally served and participated in the suit with the assistance of counsel. That court entered an order on February 3, 1953 declaring that (1) Herman's Mexican divorce was invalid; (2) Ruth was still the lawful wife of Herman; and (3) Herman and Hermine were not husband and wife.

Herman, relying in good faith on his Mexican divorce and subsequent marriage to Hermine, for the years subsequent to his divorce and remarriage:

(1) Deducted the payments made to Ruth under the separation agreement as reformed by the court in 1946, as being incident to a divorce.

(2) Filed joint income tax returns with Hermine, deducting thereon dependency exemptions for Hermine's parents and her children of a prior marriage.

The Commissioner of Internal Revenue took the position that the declaratory judgment of the New York Supreme Court established that Herman and Hermine were not husband and wife. That they were therefore not entitled to file joint returns; that Herman was not entitled to claim Hermine's children or parents as his dependents; and that the payments to Ruth were not deductible to Herman.

The Tax Court sustained the Commissioner's determination. The Second Circuit reversed, one judge dissenting, on the grounds that the Mexican divorce was a valid divorce for tax purposes. On the basis of such validation, the Circuit Court held that (1) separation payments made to Ruth, subsequent to the divorce, were deductible to Herman as being made under a written instrument incident to a divorce; (2) the marriages in Mexico and Connecticut subsequent to the divorce entitled Herman and Hermine to file joint returns; and (3) for the purpose of taking dependency exemptions on their joint returns for Hermine's parents and her minor children of a former marriage, they were held to be married. (App. A of Petition, pp. 19-40).

ARGUMENT

The issue in the present case is narrow and is not such as to warrant a review by this Court on certiorari. While there appear to be three questions presented to this Court:

1. The right of respondent to file joint returns with his wife, Hermine;

2. The right of respondent to take dependency exemptions for Hermine's parents and children of a prior marriage, on the joint return;

3. The right of respondent to deduct payments made to the first wife, subsequent to the divorce; there is in fact only one issue. Whether for the purposes of the federal tax statutes respondent had a valid divorce from Ruth. If the divorce be held valid for tax purposes, it would follow that respondent's marriage to Hermine in Mexico was valid and, therefore, they would be entitled to file joint returns, take dependency exemptions for Hermine's parents and her children and deduct the payments made to Ruth subsequent to the divorce, as being incident to a divorce.

The Second Circuit was correct in its decision that for the purposes of the federal tax statutes, there was a valid divorce and valid marriage. The decision in the instant case is not in conflict with any decisions in other Circuits. Manifestly, there is no important question of federal law requiring decision by this Court.

I

The Decision Below is Clearly Correct

A husband and wife are allowed to file joint returns under section 51(b) of the 1939 Code and its counterpart in the 1954 Code, section 6013, which provide that the marital status shall be determined at the close of their taxable year if both have the same taxable year.

The Commissioner insists that for purposes of filing joint returns marital status must be determined in accordance with the law of the state of domicle, and that Herman and Hermine were not entitled to file joint returns because the New York Supreme Court, New York County, had held them not to be husband and wife.

The Circuit Court in validating the Mexican divorce properly held that the declaration of invalidity by a jurisdiction other than the one that decreed the divorce is of no consequence under the provisions of the tax law. This rule of validation is manifestly correct. Nowhere in the Code or Committee reports is there any statement or indication that marital status should be determined in accordance with the laws of the state of domicile. On the contrary, it would seem that the intent of Congress was to have the tax law uniformly applied. In *Commissioner* v. *Lester,* 366 U.S. 299, this Court in dealing with alimony deductions, stated at page 301:

> "The hearings, Senate debates and the Report of the Ways and Means Committee of the House all indicate that it was the intention of Congress in enacting section 22(k) and section 23(u) of the Code to eliminate the uncertain and inconsistent tax consequences resulting from the many variations in state law."

In *Lyeth* v. *Hoey,* 305 U.S. 188, this Court stated at page 194:

> "In dealing with the meaning and application of an Act of Congress enacted in the exercise of its plenary power under the Constitution to tax

> income and to grant exemptions from that tax, it is the will of Congress which controls, and the expression of its will, in the absence of language evidencing a different purpose, should be interpreted 'so as to give a uniform application to a nationwide scheme of taxation'. *Burnet* v. *Harmel,* 287 U.S. 103, 110. Congress establishes its own criteria and the state law may control only when the federal taxing act by express language or necessary implication makes its operation dependent on state law."

It seems abundantly clear then that Congress intended the tax laws to be applied uniformly. The Circuit Court, in validating the Mexican divorce, recognized that under the rule of validation all taxpayers who have obtained a divorce in a particular jurisdiction are treated the same, regardless of whether the spouse against whom the decree has been obtained is able to, and does, invoke the power of another jurisdiction to declare that divorce invalid.

The Commissioner would have it otherwise. Under the interpretation he urges there would be no uniformity. The application of federal tax law would vary from state to state always depending for its interpretation, not on the intent of Congress, but on the laws of the separate states. The tax treatment of the same taxpayers could well vary as they changed domicile from one state to another. Taxpayers would, in effect, be encouraged to change domicile for tax reasons. A situation of this kind existed before the Revenue Act of 1948 when the residents of community property states had substantial tax advantages over the

residents of common law states. A number of states, in order to give their residents the same tax benefits received by residents of community property states changed from common law to community property. Congress recognizing the problem passed the Revenue Act of 1948, permitting the splitting of income by the filing of joint returns. In the Senate Report No. 1013, 80th Congress, 2nd Session, 1948, 2 U.S. Code Congressional Service 1165, dealing with the Revenue Act of 1948, it is stated "The tax-equalization features of the bill apply to the individual income tax and the estate and gift tax. They are designed to produce uniform treatment for residents of common law and community property states." Again it may be seen that uniformity in the application of federal tax laws has consistently been the intent of Congress.

The petitioner while urging that state law should govern as to the marital status of the parties, states (Petition footnote 6, page 11) "the Service [Internal Revenue] will recognize an ex parte divorce and subsequent remarriage, unless a State Court with competent jurisdiction holds it invalid." Since New York will not issue a declaratory judgment unless an action is initiated by the divorced spouse, a truly chaotic condition would ensue. Under the Commissioner's rules, respondent in the instant case would have been entitled to file a joint return with Hermine if Ruth had not brought an action for a declaratory judgment. There would thus be unequal treatment not only as between residents of different states, but also as between residents of the same state. Such dependence on the existence or non-existence of a declaratory judgment could well encourage a divorced spouse to use the

action for a declaratory judgment as a tool in negotiating for alimony.

The uniformity in the application of federal tax laws intended by Congress can only be achieved by validating a divorce granted in any jurisdiction so long as the rendering jurisdiction itself does not declare the divorce obtained invalid.

In addition to the interest in uniformity, there is an expressed Congressional intent to place the tax burden on the party receiving the benefit. This Congressional intent is restated in *Lerner* v. *Commissioner,* 195 F.2d 296, 298 (2 Cir. 1952): "the indicated Congressional policy of placing the tax burden of all general marriage settlement payments on the party entitled to their enjoyment."

The Second Circuit recognizing these factors enunciated this rule of validation. Having validated the Mexican divorce, the subsequent marriage of Herman and Hermine entitled them to the benefits of section 51(b) of the 1939 Code and its counterpart, section 6013 of the 1954 Code, which allow a husband and wife to file joint returns. Similarly under section 25 (b) of the 1939 Code and section 152 of the 1954 Code, the court held that Herman and Hermine were entitled to take dependency exemptions for Hermine's parents and her minor children of a former marriage. In concluding that respondent and Ruth were divorced for tax purposes the court held that the payments to Ruth subsequent to the divorce were deductible to Herman as being made in discharge of a legal obligation incurred under a written instrument incident to the di-

vorce under sections 22(k) and 23(u) of the 1939 Code and sections 71(a)(1) and 215 of the 1954 Code.

The decision of the Second Circuit is thus manifestly correct.

II

There is No Conflict of Decision

Petitioner asserts that the decision in the instant case conflicts with the Ninth Circuit's decision in *Gersten* v. *Commissioner,* 267 F.2d 195 (9 Cir. 1959). That there is thus a conflict between circuits as to whether a taxpayer will be treated as married to a second spouse for tax purposes where the earlier ex parte divorce from his first wife has been found invalid by a court with personal jurisdiction over the parties.

The majority opinion of the Second Circuit in the instant case held that *Gersten* was not in conflict. In its opinion, the Second Circuit, referring to the *Gersten* case, stated (page 675) it:

> "did not involve a state court judgment declaring the second marriage invalid because of the invalidity of the divorce from the first marriage. Instead, it involved a state prohibition against remarrying that operated independently of whether the divorce obtained in a foreign jurisdiction was valid."

It seems clear that these cases are not in conflict since in the instant case the claimed invalidity of the second

marriage is entirely derived from the claimed invalidity of the divorce of the first marriage, which was not in violation of any state prohibition.

Since this Circuit Court has found that the *Gersten* case is not in conflict, there is no conflict between the Circuit Courts and it is respectfuly brought to the attention of this Court that the only circuit case law in point is that of the Third Circuit, which fully supports this decision in the Second Circuit as demonstrated in *Feinberg* v. *Commissioner,* 198 F.2d 260 (3 Cir. 1952).

III

There is No Important Question of Federal Law

Petitioner maintains that important provisions in the Internal Revenue Code turn on whether the taxpayer bears the relationship of "husband," "wife" or "spouse" to another person. While this is true, it raises no important question of federal law.

It is the express intent of Congress that these federal tax statutes be applied uniformly to all people in the United States and that the tax burden of marriage settlement payments be placed on the party entitled to their enjoyment. It was not the intent of Congress to place an economic burden on a taxpayer by having him make alimony or separation payments out of after tax dollars. The Commissioner has erred in interpreting and administering these federal tax

statutes otherwise. These federal tax statutes and the Congressional reports speak for themselves, there is no ambiguity. They are to be applied uniformly without regard to the laws of the several states.

If we accept this thesis as we must, it naturally follows that a divorce valid in any jurisdiction would be valid for tax purposes so long as it was not declared invalid by the rendering jurisdiction, and a marriage valid in any jurisdiction would likewise be acceptable for tax purposes. By applying such uniform standards, the administration of the tax laws would be greatly simplified and the tax burden of marriage settlement payments would fall as Congress intended, on the party entitled to their enjoyment.

The question of conflict or ambiguity set forth by petitioner as the basis for granting his petition is not posited on the decisions of the Circuit Courts nor on Congressional intent, but purely on its own policy of interpretation. The Commissioner's interpretation of the federal tax statutes herein involved should not create an important question of federal law where the intent of the Congress was so clear and unequivocal.

Conclusion

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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